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Sherry Valdez; Salt Lake Legal Defender Assoc.; Counsel for Appellant.

Brett J. DelPorto; Assistant Attorney General; Mark L. Shurtleff; Utah Attorney General; Counsel for Appellee.

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OCT. 27, 2010
9:30am

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH, :
 :
 Plaintiff/Appellee, :
 :
 v. :
 :
 HEATHER CLOWARD, : Case No. 20090507-CA
 :
 Defendant/Appellant. : Appellant is not incarcerated.

APPELLANT'S REPLY BRIEF

Appeal from a final judgment of conviction for Aggravated Exploitation of Prostitution, a second degree felony, violation of Utah Code Ann. § 76-10-1306 (2008), in the Third District Court, Salt Lake County, State of Utah, the Honorable Ann Boyden, presiding.

SHERRY VALDEZ (11970)
SALT LAKE LEGAL DEFENDER ASSOC.
424 East 500 South, Suite 300
Salt Lake City, Utah 84111
Attorneys for Defendant/Appellant

BRETT DELPORTO (6862)
Assistant Attorney General
MARK L. SHURTLEFF (4666)
UTAH ATTORNEY GENERAL
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84114-0854
Attorneys for Plaintiff/Appellee

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SALT LAKE LEGAL DEFENDER ASSOC.
424 East 500 South, Suite 300
Salt Lake City, Utah 84111
Attorneys for Defendant/Appellant

BRETT DELPORTO (6862)
Assistant Attorney General
MARK L. SHURTLEFF (4666)
UTAH ATTORNEY GENERAL
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84114-0854
Attorneys for Plaintiff/Appellee

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INTRODUCTION

As is the case in most of its briefs, the State claims here that Appellant failed to marshal the evidence and did not preserve her claim. But the State ignores the portion of Appellant's brief quoting the testimony it claims Appellant did not acknowledge. The State also ignores the fact that this was a bench trial which is exempt from the usual preservation rules when reviewing the sufficiency of the evidence. Contrary to the State's claims, Appellant properly marshaled the evidence then proceeded as an advocate, pointing out why the marshaled evidence was not enough to prove that Cloward exploited prostitution when Wood was sent out on the call that gave rise to the charges in this case. Moreover, Appellant's insufficient evidence claim, including the discussion as to the elements that are required to prove the crime of exploitation of prostitution, are properly before this Court.

POINT. THIS COURT SHOULD REVIEW THE INSUFFICIENT EVIDENCE CLAIM AND REVERSE THE CONVICTION WHERE APPELLANT MARSHALED THE EVIDENCE, WHICH WAS INSUFFICIENT TO SUSTAIN THE CHARGE.

In her opening brief, Appellant properly marshaled the evidence. *See* Appellant's Br. at 10-11, 21-34. In fact, prior to outlining the law, Appellant listed the evidence the State relied on in attempting to make its case. Appellant's Br. at 10-11. Later, Appellant again acknowledged the evidence the State relied upon. Appellant's Br. at 21-34. Nevertheless, the State claims that this Court should refuse to review the insufficient evidence claim, arguing that Appellant failed to marshal and intimating that the marshaling error was so egregious that this Court should exercise its discretion to refuse to review the merits of the claim.

In making its claim that Appellant failed to marshal the evidence, the State disregards the evidence discussed at pages 21 – 34 of Appellant's brief. *See* Appellee's Br. at 8-10. Instead, the State focuses only on the outline of evidence contained at pages 10-11 of Appellant's brief. But even that outline contains marshaled evidence, as acknowledged by the State. Appellee Br. at 10. In fact, the summary at pages 10 -11 indicates that Wood testified that Cloward sent her on the call, had told her to take condoms when she went on a call, asked whether Wood thought her arrest was part of a "sting," and that Wood gave Cloward ten percent of her tips which she earned for any number of services. Appellant's Br. at 10-11. Moreover, although the State claims that Appellant never acknowledged that Wood testified that Cloward told her that she could do whatever she felt comfortable with, that quote appears in Appellant's brief where she

acknowledges that Wood testified Cloward told her to “do anything [she] wanted,” and to do “whatever [she felt] comfortable with. Appellant’s Br. at 22; *see* Appellee’s Br. at 9-10 (arguing Appellant did not marshal because she did not include this information) . Contrary to the State’s claim, a complete reading of the brief demonstrates that Cloward properly marshaled the evidence.

Moreover, the marshaling requirement does not demand that a defendant make the State’s argument after marshaling the evidence. Indeed, as an advocate for Appellant, counsel is allowed to argue why, in the face of the marshaled evidence, the conviction could not be sustained. In fact, after acknowledging the evidence the State relied upon to support the conviction, Appellant properly pointed out why that was not sufficient to prove that on the night Wood was arrested, Cloward had committed the crime of exploitation of prostitution. Contrary to the State’s argument, nothing about the marshaling requirement precluded Cloward from pointing out evidence that showed that Cloward did not persuade, encourage, induce or otherwise exploit prostitution when Wood went out on the call.

As outlined in Appellant’s brief at 23-34, Wood was in control of what she chose to do that night; Cloward did not direct, induce or encourage her to have sex with the undercover agent. In fact, Wood had performed only one act of prostitution on the several dozens of calls she went on (R. 82:69) but continued to be sent out as an escort, and testified that she would not have engaged in sexual activity that night except for the pressure from the officer. R. 82:38-39, 55. In addition, Cloward told Wood to leave when she heard that the customer was being aggressive and wanted sex. R. 82:27.

Despite the marshaled evidence, the evidence here shows that the State did not establish beyond a reasonable doubt that Cloward committed the crime of exploitation of prostitution.


As a final matter, the State incorrectly claims that Appellant's claim regarding the required mental state cannot be reviewed because it was not raised below. Appellee's Br. at 15-17. As Appellant outlined in her brief at 2-3, 34-35, an exception to the preservation rule exists for claims of insufficient evidence in a bench trial. In fact, Rule 52(b), Utah Rules of Civil Procedure allows review of a challenge to the sufficiency of the evidence regardless of whether such a challenge was made below. In order to assess a sufficiency challenge, this Court – and the trial court below – must necessarily assess the required elements. Hence, a discussion of the requisite mental state necessarily falls within this provision. Moreover, Appellant raised these issues as plain error. Appellant's Br. at 2-3, 34-35. The State's preservation argument is therefore without merit.

In this case where Appellant marshaled the evidence but has nevertheless shown that the State did not prove beyond a reasonable doubt that she engaged in exploitation of prostitution, this Court should review the issue and overturn the conviction.

CONCLUSION

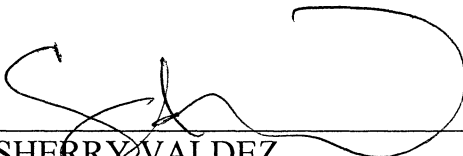
Defendant/Appellant Heather Cloward respectfully requests that this Court reverse her conviction for aggravated exploitation of prostitution.

RESPECTFULLY SUBMITTED this 6 day of October, 2010.

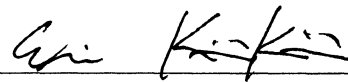

SHERRY VALDEZ
SALT LAKE LEGAL DEFENDER ASSOC.
Attorney for Appellant

CERTIFICATE OF DELIVERY

I, SHERRY VALDEZ, hereby certify that I have caused to be hand-delivered the original and seven copies of the foregoing to the Utah Court of Appeals, 450 South State, 5th Floor, P.O. Box 140230, Salt Lake City, Utah 84114-0230, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 6 day of October, 2010.


SHERRY VALDEZ

DELIVERED to the Utah Court of Appeals and the Utah Attorney General's Office as indicated above this 6 day of October, 2010.


Eric Kiffin